

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

GARRY A. WILL,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-023

SECOND ORDER ON  
SUMMARY JUDGMENT

This matter comes before the Board on Respondent Department of Ecology's (Ecology) second Motion for Summary Judgment. Attorney Richard B. Price represented Appellant Gary A. Will (Will). Assistant Attorney General Sarah Bendersky represented Respondent Department of Ecology (Ecology). Board members William H. Lynch, Chair, Kathleen D. Mix, Member, and Andrea McNamara Doyle, Member, deliberated on the motion. Administrative Law Judge Cassandra Noble presided for the Board. The Board reviewed and considered the pleadings and other motion papers contained in the Board record, including the following:

1. Respondent's Motion for Partial Summary Judgment;
2. Memorandum in Support of Respondent's Motion for Summary Judgment and exhibits 1 through 12;
3. Amended Memorandum in Support of Respondent's Motion for Summary Judgment;

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4. Declaration of Mark Schuppe in Support of Respondent's Amended Motion for Summary Judgment, dated April 7, 2006;
5. Second Declaration of Sarah Bendersky in Support of Respondent's Motion for Partial Summary Judgment, dated March 9, 2006;
6. Appellant's Memorandum Opposing Respondent's Motion for Summary Judgment;
7. Declaration of Gary Will, dated August 9, 2005;
8. Declaration of Gary Will Opposing Respondent's Motion for Summary Judgment, dated April 24, 2006, and attachments;
9. Respondent's Reply in Support of Motion for Summary Judgment;
10. Second Declaration of Mark Schuppe in Support of Respondent's Reply to Appellant's Response to Respondent's Motion for Summary Judgment; and
11. Declaration of Ron Dixon in Support of Respondent's Reply to Appellant's Response to Respondent's Motion for Summary Judgment.

The parties submitted this matter to the Board for its consideration on the written record without oral argument. Accordingly, based on its review of the foregoing documents, the Board enters the following order:

### **BACKGROUND**

Appellant Will (Will) challenges Ecology's decisions on his two water right change applications issued in January 2005. Will claims that Ecology's approval of Application Nos. CS4-ADJ38VOL5-GP42 and G4-10221P for the change of two water rights improperly subjects his water rights to senior water rights because of Ecology's finding of hydraulic continuity. He

1 denies that the wells involved are either in continuity with or interfering with any senior water  
2 rights. *Appellant's Response Opposing Respondent's Motion for Partial Summary Judgment.*

3 This case follows settlement of a previous dispute over twenty years ago. Will and  
4 Ecology entered into a Stipulation and Agreed Order that was signed on October 3, 1984 to settle  
5 the prior case, PCHB 82-205. At that time, Ecology agreed to issue a preliminary permit in the  
6 amount of 300 gallons per minute upon Will's water rights application and that Ecology would  
7 provide Will with data then held by the Department in its files, including information it gathered  
8 after a pump test on the elevation of well collars and stream beds.

9 In the instant case, the Board previously granted partial summary judgment on Issues 1(a)  
10 and 1(b) on September 30, 2005. Ecology has now moved for summary judgment on remaining  
11 Issues No. 2 and 3, which are:

- 12 2. Whether Ecology made a determination regarding groundwater-surface water  
13 interaction when it reviewed the requested changes to permit No. G4-10221P?
- 14 3. Whether Ecology has the authority, when approving the requested changes to permit  
15 No. G4-10221P, to condition that the changes be subject to existing rights?

### 16 ANALYSIS

17 Summary judgment is a procedure available to avoid unnecessary trials on formal issues  
18 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the  
19 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). Summary judgment is  
20 designed to eliminate trial if only questions of law remain for resolution, and is appropriate when  
21 the only controversy involves the meaning of statutes, and neither party contests the facts

1 relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn.App. 161,  
2 164, 796 P.2d 443 (1990), *rev. denied*, 117 Wn.2d 1004 (1991).

3       The party moving for summary judgment must show there are no genuine issues of  
4 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*  
5 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a  
6 summary judgment proceeding is one that will affect the outcome under the governing law.  
7 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts  
8 and reasonable inferences must be construed in favor of the nonmoving party as they have been  
9 in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

10       Will has rephrased the two remaining issues in the case and challenges Ecology's  
11 decision-making over the years and the sufficiency of information the agency used as to  
12 hydraulic continuity at his withdrawal site. He questions Ecology's recent determination of  
13 hydraulic continuity in light of its earlier finding of no significant interference in terms of  
14 hydraulic continuity between Will's well and Sinlahekin Creek. *Appellant's Memorandum*  
15 *Opposing Respondent's Motion for Summary Judgment*, p. 9. Will objects to Ecology action  
16 which subjects his change of place of withdrawal to senior rights and the regulation of his water  
17 right as a junior right, because such action could result in reduction and/or complete curtailment  
18 of his withdrawal. *Notice of Appeal*, p. 2 (filed Feb. 18, 2005). He claims that, in connection  
19 with settlement of his prior case, Ecology promised to issue him a preliminary permit for the  
20 requested 300 gallons per minute and cooperate with him in the development and review of

1 information on the groundwater/surface water interaction at the withdrawal sites. He states that  
2 these promises were not kept and that this has hampered him with regard to the water right  
3 change applications approved in January, 2005. Will asserts that his groundwater wells are not  
4 and could not be in continuity with, or interfere with, any claimed senior water rights. As he did  
5 in his earlier Response to Ecology's Motion for Partial Summary Judgment, Will asserts that  
6 Ecology should have provided him with the opportunity to examine any information it developed  
7 pursuant to survey investigation studies and reports, as the agency relied on these to establish  
8 groundwater-surface water interaction at Will's place of withdrawal. He questions whether there  
9 has, in fact, been any information developed that relates specifically to his site. *Will's Response*  
10 *Opposing Respondent's Motion for Partial Summary Judgment, p. 5.*

11 Ecology subjected Will's water rights to senior rights based on its conclusion that  
12 hydraulic continuity does exist between Will's wells and surface waters, stating as follows:

13 Recharge to the aquifer is derived from precipitation and potentially from side drainage  
14 sub-surface flow, but is largely dependent on surface water exchange with Sinlahekin  
15 Creek and its tributaries (i.e. Cecil Creek). As a result, a high degree of hydraulic  
connection between Sinlahekin Creek and its tributaries with the valley fill aquifer is  
recognized.

16 Report of Examination, Application No. CS4-ADJ38VOL5-GP42, January 19, 2005.

17 Will's dispute with Ecology's analysis is a factual disagreement. Regardless of how they  
18 are worded by the parties, the issues in this case concern the scientific and factual subject of  
19 hydraulic continuity, both at the Will's withdrawal site and in the vicinity. Some of Will's  
20 assertions about the implementation of the earlier settlement agreement and the actions, research

1 and conclusions reached by Ecology relate to the factual question of hydraulic continuity. Will  
2 asserts that Ecology's conclusion is simply incorrect, and that his new wells, each of which are  
3 over 100 feet deep, have no interaction with the surface water. He argues that pump tests  
4 demonstrate no interconnectivity between ground and surface waters. Will further argues that  
5 there is no well interference, impairment or adverse impact from his wells on the availability of  
6 water to any claimed senior water right. *Will's Memorandum Opposing Respondent's Motion for*  
7 *Summary Judgment, p 3-4.* These are all matters of fact.

8 Ecology argues that there are no issues of material fact regarding the remaining issues,  
9 that, in the context of this summary judgment motion, Will has presented no expert testimony  
10 regarding the hydro-geological facts and conclusions. Therefore, Ecology asserts that Will's  
11 claims are without merit and subject to summary judgment. Nevertheless, the Board agrees with  
12 Will that he should have an opportunity to cross-examine Ecology's decision makers as to their  
13 hydro-geologic analyses and determination of interconnection, and to present whatever expert  
14 testimony he deems appropriate. Also, the factual questions raised in connection with Issues 1(a)  
15 and (b) survived the granting of partial summary judgment. Although the Board has already  
16 ruled on Will's Issues 1(a) and (b) in the Order Granting Partial Summary Judgment, it also held  
17 that factual questions surrounding Issues 1(a) and (b) would survive the partial granting of  
18 summary judgment to the extent that they had relevance to Issues 2 and 3.

19 In his response to the Motion for Summary Judgment, Will submitted a declaration and  
20 documents pertaining to the earlier application, and addressing the subject of hydraulic

continuity. As the Board concluded in its previous decision, these factual matters may have relevance to the current application. Viewing the evidence presented in connection with this motion in the light most favorable to Will, the Board concludes that summary judgment is not appropriate as to the Issues 2 and 3, and therefore enters the following

**ORDER**

In accordance with the analysis above, Respondent Department of Ecology's Motion for Summary Judgment as to issues 2 and 3 is DENIED, and this matter will proceed to hearing on those remaining issues.

DONE this 27<sup>th</sup> day of July 2006.

**POLLUTION CONTROL HEARINGS BOARD**

WILLIAM H. LYNCH, CHAIR

KATHLEEN D. MIX, MEMBER

ANDREA MC NAMARA DOYLE, MEMBER

CASSANDRA NOBLE  
Administrative Appeals Judge, Presiding